83-5767

NO._____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

MICHAEL DALE LEATHERWOOD,
Petitioner,

v.

STATEMENT OF MISSISSIPPI,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF MISSISSIPPI

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Did the lower court err in allowing the jury to consider that the Capital offence was committed while the Petitioner was engaged in the commission of a robbery, and that the capital offense was committed for pecuniary gain; Does this practice amount to "Doubling Up" of aggravating circumstances?

2. Does the finding of "especially heinous, atrocious or cruel" establish an undefined death sentencing standard?

3. Is Petitioner's arguemnt procedurally barred because it was not raised in the lower court?

4. Is the death penalty being disproportionately imposed in the case at bar?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases

STATUTES

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BRIEF IN OPPOSITION

Respondent, State of Mississippi, respectfully prays that the Petition for Writ of Certiorari to the Supreme Court of Mississippi be denied in this case.

Opinion Below

The opinion of the Supreme Court of Mississippi is reported as Michael Dale Leatherwood v. State of Mississippi, 435 So.2d 645 (Miss. 1983). A copy of the opinion is before the Court as Appendix A to the Petition for Writ of Certiorari.

Jurisdiction

Petitioner seeks to invoke the jurisdiction of this Court by way of a Petition for Writ of Certiorari through the authority of 28 U.S.C. 1257(3). He had failed to do so.

Constitutional Provisions Invoked

Petitioner seeks to invoke the provisions of the Constitution of the United States, Amendment VIII. This case also involves Sections 99-19-101, 103, 105 and 107, Mississippi Code of 1972 Annotated.

Statement of the Case

Petitioner, Michael Dale Leatherwood, was indicted for the crime of Capital Murder by the grand jury of the First Judicial District of Hinds County, Mississippi during the November, 1980 Term. The indictment grew out of the August 22, 1980 slaying of Albert Taylor.

Petitioner pled guilty during the December 1981 Term of the Hinds County Circuit Court. After the guilty plea the trial continued into the sentencing stage. After hearing testimony and arguments of counsel the jury retired to consider sentence. After deliberation the jury returned a sentence of death in the proper form.

On automatic review to the Mississippi Supreme Court the sentence of death was affirmed by the Court on May 25, 1983 Leatherwood v. State, 435 So.2d 645 (1983). A petition for rehearing was denied on August 17, 1983 without written opinion.

The facts as reflected by the record show that on August 22, 1980, Jerry Fuson, George Tokman, and the Petitioner Leatherwood left Fort Polk, Louisiana, for Jackson, Mississippi, in the Petitioner's car to pick up Fuson's car which had been left in Jackson a week earlier. Fuson agreed to pay all expenses in return for the Petitioner driving him to Jackson. After they retrieved the car, Fuson revealed that he had only ten dollars for gas money for the two cars to return to Fort Polk, which was insufficient. George Tokman devised a scheme to rob a cab driver and Fuson helped plan the details "like a military operation." When the first cab answered the call, Tokman ignored the driver because he felt the driver was too young and strong. After a second call, the unfortunate victim, sixty-five year old Albert Taylor arrived and the trio entered the cab and Tokman gave Taylor an address. When the cab reached the address, Tokman requested the victim to turn off his lights because "he didn't want his parents to know he was coming in late." At this point

Petitioner Leatherwood slipped a rope around the victim's neck in order to subdue him. As the Petitioner tightened the rope, the victim was either pulled or started crawling over the back-seat. An autopsy report later showed that the victim's death was caused by intercranial bleeding suffered from blows to the head. There was conflicting testimony as to whether Petitioner told Tokman to "stab him." Tokman stabbed the victim three times in the head.

After driving the cab to a darkened alley behind a North Jackson shopping center, the trio robbed the victim of his wallet, two money bags, a flashlight, and a pistol. Later they returned to the scene of the crime after discovering that Petitioner had left his barricks' keys in the cab.

The trio netted approximately $11.00 in cash from the robbery and left Jackson early Sunday morning. Tokman cut his hand while stabbing the victim, so they stopped at a hospital in Vicksburg for medical treatment. While Tokman was in the emergency room, Petitioner and Fuson stole a man's wallet after surreptitiously gaining entry to his home and later used the victim's credit card for gas.

Thereafter, Petitioner and Tokman committed two robberies of Louisiana merchants within the next five days. Petitioner was subsequently tried and convicted for simple and armed robbery in Louisiana before his Mississippi capital murder trial.

ARGUMENT

PROPOSITION I.

THE LOWER COURT DID NOT ERR IN ALLOWING THE JURY TO CONSIDER THAT THE CAPITAL OFFENSE WAS COMMITTED WHILE THE PETITIONER WAS ENGAGED IN THE COMMISSION OF A ROBBERY, AND THAT THE CAPITAL OFFENSE WAS COMMITTED FOR PECUNIARY GAIN; IN THAT THIS PRACTICE DOES NOT AMOUNT TO AN IMPROPER "DOUBLING UP" OF AGGRAVATING CIRCUMSTANCES.

Respondent would show the jury herein found the following four aggravating circumstances:

> "We, the Jury, find unanimously and beyond a reasonable doubt the following aggravating circumstances:
>
> (1) The Capital Murder was committed while the defendant was engaged in the commission of robbery;
>
> (2) The Capital Murder was committed for pecuniary gain;
>
> (3) The Capital Murder was especially heinous, atrocious or cruel;
>
> (4) The Capital Murder was for the purpose of avoiding a lawful arrest.

Miss. Code Ann., § 99-19-101(2), poses three succinct inquires to be answered by the sentencing jury. The applicable portions of this code section are quoted as follows:

> (2) After hearing all the evidence, the jury jury shall deliberate on the following matters:
>
> (a) Whether sufficient aggravating circumstances exist as enumerated in subsection (5) of this section;
>
> (b) Whether sufficient mitigating circumstances exist as enumerated in subsection (6) of this section, which outweigh the aggravating circumstances found to exist; and
>
> (c) Based on these considerations, whether the defendant should be sentenced to life imprisonment or death.
>
> (§ 99-19-101(2)(a)(b)(c).)

The jury may not go to inquiry number two [subsection (b)] unless and until inquiry number one [subsection (a)] is answered affirmatively. If inquiries number one and two are both answered "yes", the jury may yet impose a sentence of life imprisonment if it elects to do so. And the latter statement is true even if the

sole basis for the jury's imposition of the lesser sentence is simply that it likes the defendant's looks.

The penalty of death, however, may not be imposed until at least one (1) of the statutory aggravating circumstances enumerated in 99-19-101 is unanimously found beyond a reasonable doubt [the applicable standard] and until it also finds unanimously that there are insufficient mitigating circumstances. Section 99-19-103 is very clear on this point. It reads:

> The statutory instructions as determined by the trial judge to be warranted by the evidence shall be given in the charge and in writing to the jury for its deliberation. The jury, if its verdict be a unanimous recommendation of death, shall designate in writing, signed by the foreman of the jury, the statutory aggravating circumstance or circumstances which it unanimously found beyond a reasonable doubt. Unless at least one (1) of the statutory aggravating circumstances enumerated in section 99-19-101 is so found or if it is found that any such aggravating circumstance is overcome by the finding of one or more mitigating circumstances, the death penalty shall not be imposed. If the jury cannot, within a reasonable time, agree as to punishment, the judge shall dismiss the jury and impose a sentence of imprisonment for life.
>
> (Emphasis supplied)

The focal point of the jury's initial (1st) inquiry at the conclusion of the sentencing phase is whether or not any aggravating circumstances are present. This is true because at least one of the statutory aggravating circumstances enumerated in 99-19-101 must be found to exist beyond a reasonable doubt before the jury is authorized to even consider imposing the penalty of death.

There is no presumption implicit in our statutory scheme that a mere conviction of a substantive capital felony, e.g., robbery-murder, automatically and standing alone compels a finding of death unless the defendant adduces evidence in mitigation. Nothing in our statute says that a jury must impose the penalty of death in a factual sentencing environment where one or more aggravating factors are unanimously and beyond a reasonable doubt found to exist and no mitigating circumstances are forthcoming.

It may be that there is something about the appearance, age, attitude, and demeanor of the defendant that impresses the sentencing jury and convinces its members that the accused does not deserve to die. Or some particular mitigating aspect of the defendant's life history or the particular circumstances surrounding the offense may have been injected at trial during all the guilt phase. A jury, during the second phase, might well consider each of these facts in reaching its verdict although such are not specifically placed before it during the sentencing phase by defense counsel or instruction of the court below.

In other words, even in the complete absence of mitigating factors, a sentencing jury is not compelled legislatively to return a sentence of death no matter how many aggravating factors it has before it. Our statutory scheme is primarily designed and intended to inform the State what it must prove to grant to the sentencing jury the power to consider the imposition of the sentence of death and not what the defendant must do to show to the sentencer why his life should be spared. It devolves upon the defendant, once the State has met its burden, to move forward with whatever evidence in mitigation he may muster. This is not unlike the necessity at a trial for noncapital homicide of showing that one acted justifiably upon sufficient provocation or establishing that the homicide was excusable by virtue of accident or misfortune.

A defendant enters a criminal trial shielded by a presumption of innocence and, as we see it, he enters the sentencing phase of a death penalty case clothed with a so-called presumption of life. Each, however, is rebuttable and may be overcome by a quantum of proof. It does not follow that because a defendant in petitioner's posture enters the sentencing phase of a bifurcated trial for felony-murder with one strike against him, that he is predestined to "strike-out" in the batter's box.

Is not the killing of another while one is engaged in the commission of the crimes of robbery, rape, burglary, arson, kidnapping, aircraft piracy, or the unlawful use or detonation of a bomb or explosive devise [SEE: § 99-19-101(5)(d)], a circumstance of the offense and a patently aggravating one at that? Many states, and Mississippi is one of them, have a so-called felony-murder statute. [SEE: § 97-3-19(2)(e) (Supp. 1978)] The maximum punishment, pursuant to conviction for such an offense, is harsh because of the chronically severe and aggravated nature of the offense. There is nothing in the Federal or our State Constitution that prohibits a state legislature from enacting a law that prescribes as an aggravating circumstance for the sentencer's consideration in a death penalty case a homicide perpetrated in a so-called felony-murder factual environment.

In Mississippi the punishment of death is not mandatorily imposed upon the mere conviction of a capital felony-murder. Nothing compels the jury to impose the sentence of death upon its finding of one or more statutory aggravating circumstances regardless of the stage of the proceedings that they may come to light. The finding of one or more statutory aggravating circumstances simply authorizes the jury to consider the imposition of death.

The Fifth Circuit Court of Appeals recently addressed the same argument in Henry v. Wainwright, 721 F.2d 990 (1983). Therein the Court held in part:

> Henry next contends that various constitutional deficiencies in his sentencing proceeding rendered that proceeding unreliable, standardless, and arbitrary. See generally Godfrey v. Georgia, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980). First, Henry argues that reliance by the trial judge on the § (5)(d) aggravating circumstance, murder while committing robbery, resulted in the automatic imposition of the death penalty in his case. This argument has no merit. The sentencing authority clearly has discretion in deciding whether to impose the death penalty. See Barclay, 103 S.Ct. at 3431 (Stevens, J., concurring). It is certainly not unconstitutional for the state of Florida, in

constructing a death sentencing procedure, to consider murders committed in the course of other dangerous felonies to be reprehensible. Nor, as Henry argues, does the use of the underlying felony shift the burden of proof to the defendant: the state must nevertheless prove the existence of aggravating circumstances. The Supreme Court has held the Florida statute constitutional. See Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976). Henry raises no argument here that convinces us that this case is not controlled by Proffitt.

Second, Henry argues that the trial judge improperly regarded the aggravating circumstances of murder in the commission of a robbery and murder for pecuniary gain as separate and distinct aggravating circumstances in violation of Provence v. State, 337 So.2d 783 (Fla. 1976), cert. denied, 431 U.S. 969, 97 S.Ct. 2929, 53 L.Ed.2d 1065 (1977). Henry's reading of Provence is correct as a matter of state law. We belive, however, that the decision of the Supreme Court in Barclay, ___U.S.___, 103 S.Ct. 3418, 77 L.Ed.2d 1134 (1983), controls our resolution of this issue for the reasons set forth in section I, supra. The trial judge found no mitigating circumstances, and we cannot conclude that the state-law error by the trial judge raised the possibility that the death sentence in this case was not "imposed in a consistent rational manner." Id. 103 S.Ct. at 3429 (Stevens, J., concurring). The record gives no indication that the sentencing judge considered it important that the same facts supported two statutory provisions. We therefore reject Henry's claim on this ground.

Petitioner's argument is without merit and not persuasive.

PROPOSITION II.

A FINDING OF "ESPECIALLY HEINOUS, ATROCIOUS OR CRUEL" DOES NOT ESTABLISH AN UNDEFINED DEATH SENTENCING STANDARD.

Petitioner attacks the eighth statutory aggravating circumstance of § 99-19-101(5)(h) Miss. Code Ann. (Supp. 1978), which authorizes the imposition of the death penalty if the "capital offense was especially heinous, atrocious or cruel."

Petitioner's argument was not raised at trial or on appeal to the Mississippi Supreme Court and therefore under the rationale of Webb v. Webb, 451 U.S. 493, 68 L.Ed.2d 392, 101 S.Ct. 1889 (1981) and Cardinale v. Louisiana, 394 U.S. 437, 22 L.Ed.2d 398, 89 S.Ct. 1162 (1969) this Court lacks jurisdiction to decide an issue that has never been presented to the state Courts or was not presented in a federal constitutional context to the state courts.

As held in Webb, supra:

> It is a long-settled rule that the jurisdiction of this Court to re-examine the final judgment of a state court can arise only if the record as a whole shows either expressly or by clear implication that the federal claim was adequately presented in the state system. New York ex rel. Bryan v. Zimmerman, 278 U.S. 63, 67, 73 L.Ed. 184, 49 S.Ct. 61, 62 ALR 785 (1928); Oxley Stave Co. v. Butler County, 166 U.S. 648, 655, 41 L.Ed. 1149, 17 S.Ct. 709 (1897).
>
> It is appropriate to emphasize again, see Cardinale v. Louisiana, supra, at 439, 22 L.Ed.2d 398, 89 S.Ct. 1161, that there are powerful policy considerations underlying the statutory requirement and our own rule that the federal challenge to a state statute or other official act be presented first to the state courts. These considerations strongly indicate that we should apply this general principle with sufficient rigor to make reasonably certain that we entertain cases from state courts only where the record clearly shows that the federal issue has been properly raised below.
>
> (68 L.Ed.2d at 398)

If Petitioner had succeeded in invoking the jurisdiction of this Court, which he has not, his argument would have been without merit.

It must also be noted that the jury found that three other aggravating circumstances existed, i.e., the capital murder was committed while the defendant was engaged in the commission of robbery; the capital murder was for pecuniary gain; the capital murder was for the purpose of avoiding a lawful arrest.

In response to Petitioner's Argument regarding § 99-19-101 (5)(h) respondent would show that the identical question was raised in Edwards v. State, 441 So.2d 81 (Miss. 1984). Responding thereto, the Court held:

> Appellant contends that the facts as applied to the law of the case prohibited the granting by the court of an instruction authorizing the jury to find as an aggravating circumstance in the sentencing phase that "the capital offense was especially heinous, atrocious or cruel." There is a contention, among others, that the court should have gone further and instructed the jury that it was necessary for them to find appellant's act "conscienceless or pitiless . . . unnecessarily torturous to the victim," as discussed by this Court in Coleman v. State, 378 So.2d 640 (Miss. 1979). In answering this first contention, the record reveals that there was no request by the appellant for such an extra instruction and he is procedurally barred from raising that issue here. Newell v. State, 308 So.2d 71 (Miss. 1975). Regardless of this procedural bar, we do not find, as hereinafter discussed that the addition of these words was necessary even though they had been requested. In Washington v. State, 361 So.2d 61 (Miss. 1978), we stated as follows:
>
> > The facts in no two cases are exactly identical and no precise definition or formula can be made to cover every possible factual situation.
> >
> > It is our considered opinion that the average jury in its sound discretion and judgment understands the generally accepted meaning of the words "especially heinous, atrocious or cruel" and is able to apply these words to different factual situations without further definition of these words.

It is our opinion that these words are not unconstitutionally vague.

Appellant relies primarily on the case of Godfrey v. Georgia, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980). There a plurality of the court reversed the appellant's death sentence stating that the trial court erroneously authorized a jury to find aggravating circumstances under only one statutory provision: that the killing was "outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim." George Code § 27-2534.1(5)(7). It should be noted at the outset that this was the only aggravating circumstance submitted to the jury by the trial court, although the Georgia statute provided for other aggravating circumstances, if applicable. An important distinguishing feature we shall discuss, which was relied on by the plurality when it said:

> [T]he jury imposed sentences of death on both of the murder convictions. As to each, the jury specified that the aggravating circumstances they had found beyond a reasonable doubt was that the offense of murder was outrageously or wantonly vile, horrible and inhuman.

The basis of the plurality opinion was that all murders could be said to be outrageous, or wantonly vile, horrible, and inhuman. We clearly do not have a situation in the case sub judice that confronted the widely divided court in Godfrey, supra. The Mississippi statute defining aggravating circumstances to be considered by the jury lists eight in number. In addition to "the capital offense was especially heinous, atrocious or cruel." [MCA § 99-19-101(5)(h), (Supp. 1980)1, the court in the case sub judice authorized the jury to find another aggravating circumstance, to-wit: "The capital offense was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws." [MCA § 99-19-101(5)(g) (Supp. 1980)].

The evidence was undisputed that at the time appellant killed the deceased, the latter and his companion were dressed in police uniforms, had driven up in a plainly marked police department vehicle, and the area was lighted. Undisputedly, appellant was in a position to see clearly all of these circumstances.

As previously discussed under Godfrey, supra, the quoted language of the Georgia statute was the "only" aggravating circumstance presented for the jury's consideration. In the case sub judice, we have another equally important aggravating statutory circumstance that the jury not only easily could have found to be present, but would have been manifestly wrong in not considering that circumstance, as it was undisputed.

Appellant relies on the Louisiana Supreme Court case of State v. Sonnier, 402 So.2d 650 (La. 1981). It is noted that the Louisiana Court agreed with the plurality opinion in Godfrey regarding the aggravating circumstance of "especially heinous, atrocious or cruel." The Louisiana Court then went further and affirmed the conviction and death penalty for the reason that, as in the case sub judice, other statutory and aggravating circumstances were presented for the jury's consideration which amply supported the verdict. The Louisiana Court stated:

> There was no evidence that the male victim was subjected to any serious physical abuse, and the evidence may not be constitutionally sufficient to support a finding that the female was the victim of torture or the pitiless infliction of unnecessary pain.
>
> However, the evidence was clearly sufficient to support the jury's findings of four out of the five aggravating circumstances it listed. A majority of this Court has held that it knows of no constitutional requirements that a death sentence be vacated whenever the jury errs in only one of its findings of several statutory aggravating circumstances. State v. Monroe, 397 So.2d 1258 (La. 1981). Accordingly, the failure of one aggravating circumstance in this case does not so taint the proceedings as to invalidate the other aggravating circumstances found or the sentence of death.

The Supreme Court of Florida in Peek v. State, 395 So.2d 492 (Fla. 1980), recognized that even though one or more statutory aggravating circumstances were improperly submitted to the jury, the jury could consider other properly submitted aggravating circumstances without requiring a reversal of the case.

> Thus, we have two clearly valid aggravating circumstances, one contested but valid aggravating circumstance, and no mitigating circumstances. We find that the trial court's improper consideration of the two aggravating circumstances concerning pecuniary gain and commission of the offense while on probation does not render the sentence invalid.

In our opinion the above discussion regarding Godfrey, supra, as it applies to the case sub judice, is sufficent to affirm on the presently discussed assignment of error. We go further, however, and discuss aggravating circumstances (h), as it applies to the undisputed facts presented the jury during the trial, which record was introduced on the sentencing phase. Upon objection by appellant of the one aggravating circumstance of "especially heinous, atrocious and cruel", the trial court in overruling

the objection stated:

> Well, I find, in my opinion, the testimony shows that the deceased was shot with a shotgun with No. 6 shots at a distance that it would clearly cover the entire body and it was fired twice, once in one side while the victim was retreating and the second shot, which was the fatal shot, was fires while he was moving away from him. I feel that that is for the jury's consideration.

> The undisputed facts are that appellant deliberately aimed the shotgun at the deceased and fired two times in succession. The first blast of the shotgun hit the deceased in the side and the second hit the deceased in the back while he was attempting to retreat. A large number of pellets struck the body of the deceased over both his side and back. The deceased then called to his companion that he had been hit. After these occurrences, the deceased was conscious long enough to fire all six rounds from his .357 Magnum, Smith & Wesson, weapon in the direction of appellant. Certainly, there was a question for the jury as to whether or not deceased suffered physical agony and mental anguish. The testimony was certainly sufficient for the jury to find that the infliction of the wounds was "unnecessarily torturous" and was "pitiless". As stated in Spinkellink v. Wainwright, 578 F.2d 582 (5th Cir. 1978), "we feel that the term 'especially heinous, atrocious and cruel,' is a matter of common knowledge so that ordinary men would not have to guess at what was intended."

> In Godfrey, supra, not only was there just one aggravating circumstance submitted to the jury, there is the additional fact that both of the deceaseds were killed instantly. The crime was committed in the heat of passion, resulting from family difficulties. We find that the plurality opinion in Godfrey does not apply to the case sub judice. Even with this clear situation there were a number of dissenting opinions in Godfrey based on the facts of that particular case.

> We conclude that under the undisputed evidence in this case, the aggravating circumstance of "especially heinous, atrocious and cruel" was proper. In addition, and as a completely separate and distinct reason, we conclude that even though it had been improper, the fact that another undisputed aggravating circumstance was properly presented for the jury's consideration, requires that the case should be affirmed as to this assignment of error.

We are not, therefore, in accord with petitioner's assertion that the Supreme Court of Mississippi has never defined the

statutory language "especially heinous, atrocious, and cruel." It has on several occasions done so, albeit indirectly. The Court has characterized such killings as "wanton, willful, useless and cruel",[1] "brutish" and "brutal",[2] "senseless",[3] and "unprovoked."[4] Moreover, the Court has looked to the posture of the victim and the motive or purpose of the defendant in perpetrating his crime.[5] Such is not constitutionally impermissible but is a product of common sense.

Summarizing our response to this particular contention, we respectfully submit that § 99-19-101(5)(h) has not been applied so broadly as to create a "standardless and unchanneled imposition of death sentences." Godfrey v. Georgia, 446 U.S. 420, 64 L.Ed.2d 398, 100 S.Ct. 1759 (1980). Nor is there any compelling reason to think that such a result will occur in the future.

As to the actual demonstration before the jury, Respondent would show such was relevant to the question of whether the killing was done in an "especially heinous, atrocious or cruel manner."

Jerry Fuson testified that Petitioner "threw the rope around his neck and jerked him up and halfway over into the backseat" and held the rope around the victim's neck for several minutes. Fuson also testified that the victim still had a pulse, but Petitioner held the rope tight declaring that nobody could have lived through having that kind of jolt to his neck. It was within the jury's province to find this aggravating circumstance as instructed by the court. Petitioner's demonstration was not prejudicial.

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[1] SEE: Washington v. State, 361 So.2d at p. 67.

[2] SEE: Gray v. State, 375 So.2d at p. 1004.

[3] SEE: Culberson v. State, 379 So.2d at p. 510; Coleman v. State, 378 So.2d at p. 650.

[4] SEE: Culberson v. State, 379 So.2d at p. 510.

[5] SEE: Reddix v. State,

PROPOSITION III.

PETITIONER'S THIRD ASSIGNMENT OF ERROR IS PROCEDURALLY BARRED.

Petitioner now attempts to argue the trial court erred in refusing Defense Instructions 22 and 25. Petitioner seeks to invoke jurisdiction based on Justice Robertson dissent and the authority found in Gardner v. Florida, 430 U.S. 349, 361 (1977).

Respondent would show that in Gardner, supra, the State did not urge that the objection had been waived; however, Respondent herein strenuously objects to the requirements of Cardinale v. Louisiana, 394 U.S. 437, 22 L.Ed.2d 398, 89 S.Ct. 1162 (1969), being nullified. As set forth in Cardinale:

> It is a long settled rule that the jurisdiction of this Court to re-examine the final judgment of a state court can arise only if the record as a whole shows either expressly or by clear implication that the federal claim was adequately presented in the state system. (citations omitted).

Even if Petitioner had succeeded in invoking the jurisdiction of this Court, which he has not, his argument would have been without merit.

In Gray v. Lucas, 677 F.2d 1086 (1982), the United States Court of Appeals for the Fifth Circuit recently held:

> Fifth, Gray argues that once an aggravating factor is established by the state, the burden of proof is impermissibly shifted to the defendant. Gray contends that to avoid the death penalty, the defendant must show that the mitigating factors outweigh the aggravating factors. Gray argues that this allocation of proof creates an unconstitutional presumption of death.
>
> Gray's argument, however, is based on a misapprehension of the applicable state law. Section 99-19-103 of the Mississippi Code provides that the jury may not impose the death penalty unless it finds that at least one statutory aggravating circumstance exists and that the aggravating circumstances are not outweighed by the mitigating circumstances. See Miss. Code Ann. § 99-19-103. The burden of proving an aggravating circumstance

> exists as part of the prosecution's general bundle. Gray v. State, 351 So.2d 1342, 1345 (Miss. 1977) (appeal from Gray's first trial). The defendant is permitted but not required to offer any relevant mitigating circumstances not encompassed in the prosecutor's presentation. No burden of proof or persuasion is assigned, just as the defendant's option to develop proof of alibi, good character, or, in this case, mental instability does not operate to shift the burden of proof, so the choice to present any number or kind of mitigating circumstances does not. Moreover, even if the jury finds that the aggravating circumstances outweigh the mitigating circumstances, it is not required to impose the death penalty. It may still sentence a defendant to life imprisonment. See Coleman v. State, 378 So.2d 640, 647 (Miss. 1979). Thus, the statutory procedures act only to require the prosecution to build the aggravating circumstance bridge the jury must cross to be entitled to impose the death penalty. Cf. Stephens v. Zant, —— U.S. ——, 102 S.Ct. 1856, 72 L.Ed.2d 222 (1982). They do not limit its ability to impose a life sentence. Every mandatory element of proof is assigned to the prosecution. Neither the burden of production nor the burden of proof ever shifts to the defendant.

Petitioner's argument is not properly before this Court nevertheless it is clearly without merit.

PROPOSITION IV.

THE PENALTY OF DEATH IS NOT DISPROPORTIONATE TO THE PENALTY IMPOSED IN SIMILAR CASES.

This Court on January 23, 1984 addressed the issue of sentence proportionality in Pulley v. Harris, 52 U.S.L.W. 4141 (U.S. Jan. 23, 1984), reversed and remanded, 692 F.2d 1189 (9th Cir. 1982). Therein this Court held as follows:

> There is thus no basis in our cases for holding that comparative proportionality review by an appellate court is required in every case in which the death penalty is imposed and the defendant request it. Indeed, to so hold would effectively overrule Jurek and would substantially depart from the sense of Gregg and Proffitt. We are not persuaded that the Eighth Amendment requires us to take that course.

Respondent would nevertheless submit that the death sentence for the capital murder committed during the robbery by Petitioner was not disproportionate to the penalty imposed in similar cases. All the aggravating and mitigating circumstances were presented to the jury and it cannot be said that the death sentence is excessive in this light. By reviewing the record and comparing it to each of the other decisions upholding death penalties in robbery-murder cases we are confident that this Court will conclude as we do.

In the death penalty decision of King v. State, 421 So.2d 1009 (Miss. 1982), this Court attached as Appendix "A" a comprehensive list of death cases affirmed to date by this Court. Ten (10) of those cases involved murders while the defendants were engaged in the commission of robbery, viz., Smith, Edwards, Bullock, Reddix, Jones, Culberson, Voyles, Irving, Washington, and Bell [citations omitted]. The cases of Wheat v. State, 420 So.2d 229 (Miss. 1982); and Evans v. State, 422 So.2d 737 (Miss. 1982), also be added to that list.

Respondent would show the death sentence rendered herein is consistent with the cases as listed above and is not disproportionate in light of the aggravating circumstances.

CONCLUSION

For the reasons stated above the Petition for Writ of Certiorari to the Supreme Court of Mississippi should be dismissed.

Respectfully submitted,
EDWIN LLOYD PITTMAN, ATTORNEY GENERAL

Carolyn B. Mills

BY: CAROLYN B. MILLS
SEPCIAL ASSISTANT ATTORNEY GENERAL

CERTIFICATE

I, Carolyn B. Mills, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, a copy of the foregoing Petition For Writ Of Certiorari to the Supreme Court of the State of Mississippi and Brief In Opposition to Honorable Michale Sandler, STEPTOE & JOHNSON, Chartered, 1250 Connecticut Avenue, N.W., Washington, D.C. 20036.

This, the 10th day of February, A.D., 1984.

Carolyn B. Mills
SPECIAL ASSISTANT ATTORNEY GENERAL